Filed 12/27/04 In re Eric H. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ERIC H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ERIC H., Defendant and Appellant.	F045714 (Super. Ct. No. 03CEJ601327-1V2) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. M. Bruce Smith, Judge.

James Bisnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Dibiaso, Acting P.J., Vartabedian, J., and Harris, J.

Appellant Eric H., a minor, was initially adjudged a ward of the juvenile court in 2003 after he admitted an allegation he committed an act of misdemeanor vandalism (Pen. Code, § 594, subd. (a)). Thereafter, appellant violated his probation three times. Following the third of these violations, on May 27, 2004, the court readjudged appellant a ward of the court and ordered him detained pending placement. On June 1, 2004, appellant was placed in the Paragon Group Home.

Appellant contends the court erred in (1) ordering placement rather than releasing appellant to the custody of his mother and stepfather, and (2) failing to consider ordering an individual education plan to investigate the possibility appellant may have special educational needs. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As indicated above, appellant was initially adjudged a ward of the court in September 2003. The report of the probation officer (RPO 1) prepared in connection with the subsequent disposition proceeding indicates the following. A witness saw appellant slash the tire of a car. Appellant told the police "he was drunk" and he "didn't know why [he slashed the tire]." Appellant told the probation officer he consumed vodka on a daily basis, he drank beer when he ran out of vodka and he had used various drugs including marijuana, methamphetamine and LSD.

At the time of the offense, appellant was in the 10th grade. He was in "[m]ainstream" program; he "had 59 unexcused absences" for the 2002-2003 school year, and the "Academic Performance" portion of RPO 1 indicated his grades consisted of "Four F's." In addition, from March 2000 to April 2002 appellant was the subject of 63 "disciplinary referrals" and was suspended from school seven times. His transgressions included fighting, "defiance/disruption," and truancy.

Appellant lived with his mother, Sheila O. (Sheila),[1] and his stepfather, Sheila's husband. Both Sheila and her husband were not employed. Sheila received $475 per month in "child support benefits." Sheila told the probation officer the following: appellant was an " 'habitual runaway' "; he "has made threats of violence toward family members on several occasions"; appellant's mother had found it necessary to call the police to her residence on 15 occasions "because of [appellant's] misbehavior, including being under the influence of drugs, running away or breaking windows"; she has tried to discipline appellant but "nothing works"; and appellant "needs to be 'locked up' for a period of time," and to participate in drug and alcohol abuse counseling and anger management classes.

Child Protective Services (CPS) worker Lena Self indicated the following. Sheila contacted CPS for help in June 2003. During her investigation, Self "discovered [appellant] had been molested by an adult male when he was in the sixth grade." Appellant's mother "was aware of this, but took no action." Self "was told that the minor molested his younger sister on one occasion, but this incident was not reported to the police until Self insisted." Appellant's stepfather claimed "his hands are registered with the police department as a deadly weapon because he has a 'black belt' "; and he told another CPS worker "he intend[ed] to 'beat the crap' out of [appellant]."

The probation officer recommended that appellant "be removed from the home temporarily." He opined that appellant "represents a danger to the family members and should not return home until he has completed a program of counseling." The officer also expressed "concerns as to the appropriateness of the minor's home environment," based on the stepfather's remarks to the CPS workers and the mother's "failure . . . to report the molestation of the minor and his younger sister . . . ."

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[1] For the sake of brevity and clarity, and not out of disrespect, we refer to Sheila O. by her first name.

Following the disposition hearing, on October 3, 2003,[2] the court ordered appellant placed in the Genesis Group Home. Four days later, appellant absconded from his placement. On October 24, appellant admitted violating his probation, and on October 27 he was accepted into Substance Abuse Unit (SAU) at the Fresno County Juvenile Hall. On November 17, appellant entered the SAU.

According to the December 3 report of the probation officer, appellant was removed from SAU after 23 days, after violating his probation by "fail[ing] to comply with the SAU program" and failing to comply with the instructions of juvenile hall staff. Appellant "has stated several times he does not want to participate in the SAU program and will do whatever he has to, to be removed from the program."

On December 5, the court found appellant to be in violation of probation and ordered him committed to the Ashjian Treatment Center for 152 days. On May 4, 2004,[3] appellant completed his commitment and was placed at KDTA Group Home. Appellant violated his probation when, according to the report of the probation officer dated May 26, on May 14, he "absconded from supervision, as he was not at his pick up location at [the high school he attended] when staff arrived . . . ." Appellant was still at large on May 26. On May 27, appellant appeared in court, at which time the court readjudged him a ward of the court and ordered him detained pending placement. On June 1, appellant was placed at Paragon Group Home.

Sheila submitted to the court a letter dated May 26 in which she asked the court to place appellant with her and appellant's stepfather. She also stated the following. Although appellant "ran from the Group Home, . . . this time he came to me and asked me to bring him into his probation officer so that he could turn himself in." Appellant

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[2] Except as otherwise indicated, references to dates of events are to dates in 2003.

[3] Except as otherwise indicated, further references to dates are to dates in 2004.

told his mother "he realizes and understands that he needs to just finish out the time he has left in order to clear his record and to be able to pursue the goals that he set for himself." Sheila and her husband "feel that [appellant] is sincere." Sheila has a full-time job and health insurance coverage for appellant, including coverage for "counseling and the medication that he needs for his well-being." Appellant's stepfather is a "student" with a "flexible" schedule, and is willing to take appellant to school and to appointments, and to "monitor his school work while [Sheila] is at work . . . ."

DISCUSSION

Group Home Placement

Appellant contends the court abused its discretion in failing to order appellant returned to the custody of his mother and stepfather. He bases this contention, in turn, on the following claims: there was "[n]o evidence" such an order would have "jeopardize[d] [appellant's] welfare or that of the public"; because of the improved financial circumstances of the family, the new "understanding" reached between appellant and his mother and stepfather and the desire of Sheila and her husband to have "the family unit together again," placing appellant "in his loving family and with his natural mother" would "promote [appellant's] welfare"; and failing to return appellant to the custody of his mother and stepfather violated the "primary objective of the juvenile delinquency law," viz., the promotion of " 'reunification' of 'the family' . . . ."

"In reviewing a juvenile court's disposition—whether it be a commitment to the California Youth Authority [CYA] or a disposition of a less serious nature—the appellate court must indulge in all reasonable inferences from the evidence and the record to support the action of the juvenile court. [Citations.] An order of disposition, made by the juvenile court, may be reversed by the appellate court only upon a showing of an abuse of discretion." (*In re Darryl T.* (1978) 81 Cal.App.3d 874, 877.) A juvenile court does not abuse its discretion where its dispositional order is supported by substantial evidence. (Cf. *In re Lorenza M.* (1989) 212 Cal.App.3d 49, 53 [Youth Authority commitment].)

In determining whether a particular disposition was within the juvenile court's discretion, we must examine the record in light of the purposes of the law governing delinquency adjudications. (Welf. & Inst. Code, § 200 et seq; *In re Lorenza M.*, *supra*, 212 Cal.App.3d 49, 53.) Accordingly, we look to Welfare and Institutions Code section 202, which provides, in relevant part, as follows:

"(a) The purpose of this chapter is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. When removal of a minor is determined by the juvenile court to be necessary, reunification of the minor with his or her family shall be a primary objective. When the minor is removed from his or her own family, it is the purpose of this chapter to secure for the minor custody, care, and discipline as nearly as possible equivalent to that which should have been given by his or her parents. This chapter shall be liberally construed to carry out these purposes.

"(b) . . . Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter. If a minor has been removed from the custody of his or her parents, family preservation and family reunification are appropriate goals for the juvenile court to consider when determining the disposition of a minor under the jurisdiction of the juvenile court as a consequence of delinquent conduct when those goals are consistent with his or her best interests and the best interests of the public."

Thus, "when we assess the record in light of the purposes of the Juvenile Court Law [citation], we evaluate the exercise of discretion with punishment and public safety

and protection in mind." (*In re Lorenza M.*, *supra*, 212 Cal.App.3d at pp. 57-58; accord, *In re Jimmy P.* (1996) 50 Cal.App.4th 1679, 1684 ["[a] fundamental premise of delinquency adjudication is that the court must focus on the dual concerns of the best interests of the minor and public protection"]; *In re Asean D.* (1993) 14 Cal.App.4th 467, at p. 473 ["the 1984 amendments to the juvenile court law reflected an increased emphasis on punishment as a tool of rehabilitation, and a concern for the safety of the public"].)

As appellant indicates, some evidence supports the claim that placement with the minor's mother and stepfather, rather than in a group home, would be in appellant's best interests and would also be adequate to provide for the protection and safety of the public. However, the record does not compel this conclusion. In addition to the evidence cited by appellant, the record also contains evidence of the following: appellant is an "habitual runaway"; he has serious drug and alcohol problems; he deliberately failed in the placement aimed at addressing those problems; he failed two group home placements; and he threatened members of his family with violence. On this record, the court reasonably could have concluded that Sheila's opinion that appellant was sincere in his desire to reform was entitled to little weight and that a disposition less restrictive than group home placement would not have been adequate to hold appellant accountable for his actions or to provide for the safety and protection of the public. Moreover, as indicated above, substantial evidence also supports the probation officer's opinion as expressed in RPO 1 that placement with appellant's mother and stepfather would be detrimental to appellant's well-being. For the foregoing reasons, the court's disposition order did not constitute an abuse of discretion.

Court's Consideration of Appellant's Educational Needs

Appellant contends the evidence "raised a reasonable inference" that he suffered from a "mental disorder" which "may well have affected and impacted his school performance," and that therefore the court abused its discretion "in failing to find" that

appellant was a "child with a disability" (20 U.S.C., § 1401, subd. (3)(A)) within the meaning of the Individuals With Disabilities Act (IDEA) and in failing to order the preparation and implementation of an "individualized education program" (IEP) (Ed. Code, § 56001, subd. (e)).

Statutory and Regulation Background

Education Code section 56000 declares that " 'all individuals with exceptional needs have a right to participate in free appropriate public education . . . .' " Section 56001 provides that "[i]t is the intent of the Legislature that special education programs provide [inter alia] . . . [¶] [that] (e) [e]ach individual with exceptional needs shall have his or her educational goals, objectives, and special education and related services specified in a written individualized education program."

" 'Individuals with exceptional needs' includes any child who is '[i]dentified by an . . . [IEP] team as a child with a disability,' as defined by the Individuals with Disabilities Education Act (20 U.S.C., § 1400 et seq.), whose impairment 'requires instruction, services, or both which cannot be provided with modification of the regular school program' and who meets certain other prescribed eligibility criteria. (Ed. Code, § 56026, subds. (a), (b), (c) & (d).) A child qualifies as an individual with exceptional needs if the IEP team determines 'the degree of the pupil's impairment . . . requires special education in one or more of the program options authorized by Section 56361 of the Education Code.' (Cal. Code Regs., tit. 5, § 3030.)" (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1397-1398.) "[P]upils whose educational needs are due primarily to limited English proficiency; a lack of instruction in reading or mathematics; temporary physical disabilities; social maladjustment; or environmental, cultural, or economic factors are not individuals with exceptional needs." (Ed. Code, § 56026, subd. (e).)

Factual Background

Appellant bases his claim that his "mental disorder may well have . . . impacted his school performance" on the following.

The record contains three form documents, each prepared by a probation officer and entitled, "Placement Needs Assessment and Case Plan," dated, respectively, September 10, 2003; October 23, 2003; and November 2, 2003. (Unnecessary capitalization omitted.) Each contains a section entitled "Identified Needs in Placement," consisting of a list of potential needs, with boxes for the preparer to check to indicate which "needs" have been "identified." On none of these case plan forms are the boxes for "Special Ed Programs" and "IEP/RSP" checked. Appellant asserts these documents show the probation officer "failed to investigate and recommend an [IEP] for [appellant]."

RPO 1 states: "[Sheila] reported that the minor was placed on the medication Ritalin for a few months during the 8th grade . . . . [Sheila] said she could not remember the diagnosis made. She said the medication did not help the minor, so she stopped giving it to him. [¶] The minor said that he was diagnosed with Attention Deficit Hyperactivity Disorder in the past, but has not taken Ritalin since the 9th grade."

In a letter to the court dated December 3, 2003, Sheila stated, "I have spoken with his counselor and it looks like he is duo [*sic*] diagnosed." Appellant asserts, and respondent does not dispute, that appellant's mother meant to indicate appellant was "dual diagnosed," i.e., suffering from both a "substance abuse problem" and "a mental illness or brain disorder such as [attention deficit hyperactivity disorder]."

Analysis

Appellant relies chiefly on *In re Angela M.*, *supra*, 111 Cal.App.4th 1392. In that case, Angela was adjudged a ward of the court for making criminal threats; she was placed on probation; she subsequently admitted violating probation; and the juvenile court ordered her committed to CYA.

However, the court-appointed psychologist who examined Angela recommended placement and treatment in a psychiatric/treatment-based facility. He opined that Angela was suffering from bipolar disorder, and he "believed she may also be experiencing

symptoms associated with ADHD." (*In re Angela M.*, *supra*, 111 Cal.App.4th 1392 at pp. 1398-1399, fn. omitted.) He also "specifically recommended that Angela 'undergo an IEP'—that is, that she be evaluated by education professionals to determine whether she had special education needs." (*Id*. at p. 1399.) The appellate court stated that, based on this evidence, "[t]he juvenile court . . . was clearly on notice that Angela may have special educational needs." (*Id*. at p. 1398.)

The court noted that former "California Rules of Court, rule 1439(e)(5) implements [the] legislative mandate to provide free special education services to all eligible children by directing that the juvenile court, when declaring a child a ward of the court, 'must consider the education needs of the child . . . .' " (*In re Angela M.*, *supra*, 111 Cal.App.4th at p. 1398, fns. omitted.)[4] The court held: "Although the record indicates special attention to Angela's education needs was appropriate, the juvenile court did not mention this issue when committing her to the CYA. Remand is necessary to permit the juvenile court to make proper findings, on a more fully developed record, regarding Angela's educational needs." (*Id*. at p. 1399, fn. omitted.)

Appellant argues, "[t]his Court should follow the mandate of Angela M. and remand the matter back to the trial court for the preparation of an IEP, or at least a more

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4 Effective January 1, 2004, the Judicial Council of California removed the requirement from the rule that the juvenile court "must consider the educational needs of the child." This newer version of the rule was in effect at the time of appellant's disposition hearing. Respondent, however, does not argue that the juvenile court was *not* required to consider appellant's educational needs. And the Standards of Judicial Administration Recommended by the Judicial Council provide that the juvenile court should "[t]ake responsibility, . . . at every stage of the child's case, to ensure that the child's educational needs are met . . . ." (Cal. Stds. Jud. Admin. § 24(h).) We assume without deciding that at all times relevant here, as at the time *Angela M.* was decided, in fashioning a disposition order a juvenile court is required to consider a minor's educational needs.

fully developed record on the issues of Eric's mental disability and its [effect] upon his [school work.]" *Angela M.*, however, is inapposite.

In that case, as indicated above, the psychologist who examined the minor diagnosed the minor as suffering from bipolar disorder and specifically stated that an IEP was necessary in order to properly evaluate her educational needs. No evidence contradicting the psychologist's opinion was presented to the court. Here, there was no mention in the record of an IEP, except for the three case plans in which probation officers indicated none was needed. And the only indication appellant suffered from a mental disorder was his mother's statement that appellant had taken Ritalin "for a few months during the 8th grade" and appellant's statement he had been diagnosed with ADHD at some point "in the past . . . ." Moreover, appellant's counsel did not claim at the disposition hearing that appellant needed an IEP or had any special educational needs, and there is no indication in the record appellant had ever been in special education programs.

On this record we conclude that unlike in *Angela M.*, there was no evidence compelling a finding that the court did not adequately consider the minor's educational needs.

DISPOSITION

The order appealed from is affirmed.